

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE THOMAS KINKADE CO.,

Plaintiff,

v.

THOMAS B. BAGGETT III, et al.,

Defendants.

No. C 04-0686 PJH

**SECOND SUPPLEMENTAL
FINAL PRETRIAL ORDER**

Plaintiff has requested by letter brief that the court strike defendants' designations of deposition testimony from various arbitration proceedings. Defendants submitted an opposition. Plaintiff's request is GRANTED. Under Fed. R. Civ. P. 32(a)(4), deposition testimony may only be used in trial proceedings that involve "the same subject matter" as the proceeding in which the testimony at issue was taken. The arbitration proceedings from which defendants' proposed designations are taken did not concern copyright infringement or damages, and most of them did not even involve the same parties as those here. Additionally, Rule 32(a)(4) appears to permit the use of prior depositions taken and duly filed in an action brought in state or federal court, not those taken in the course of an arbitration proceeding. The parties have cited no authority to the contrary. However, deposition transcripts from the arbitration may be used for impeachment purposes as long as the testimony was given under oath. Fed. R. Evid. 801(d)(1)(A).

In addition, the parties shall meet and confer and prepare a joint instruction containing a description of the case and advising the jury that the court has already determined the defendants' liability to be submitted on the first day of trial.

IT IS SO ORDERED.

Dated: June 9, 2005



PHYLLIS J. HAMILTON
United States District Judge